No. 85-5939

In the Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ, PETITIONER

v.

STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the judgment can be supported on the ground that the non-testifying co-defendant's confession was sufficiently reliable to satisfy the Confrontation Clause.

2. Whether a co-defendant's out-of-court confession can be admitted at a joint trial, with proper limiting instructions, when the co-defendant's confession interlocks with petitioner's own confession on the essential elements of the crime.

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INTEREST OF THE UNITED STATES

This case raises important issues under the Confrontation Clause of the Sixth Amendment. The case involves out-of-court statements made by a non-testifying co-defendant to a civilian and later to the police. Those statements were admitted solely against the co-defendant. Petitioner himself confessed to the same civilian, and petitioner's confession was factually consistent with the co-defendant's statements. Respondent argues that the admission of the co-defendant's statements was proper on two grounds. First, respondent argues that the co-defendant's statements were sufficiently reliable that they could have been admitted even as substantive evidence against petitioner without violating the Confrontation Clause. Second, respondent argues that the fact that the co-defendant's confessions interlocked with petitioner's own confession prevented the co-defendant's statements from having a devastating effect on petitioner's case, see *Bruton* v. *United States*, 391 U.S. 123 (1968). It was

constitutionally permissible, respondent contends, for the trial court to admit the co-defendant's confession in the joint trial, subject to limiting instructions from the court.

The proper application of the Confrontation Clause in joint trials is a question that arises every day in federal criminal cases. The approach taken by the Court in resolving the issues in this case will significantly affect federal criminal prosecutions.

STATEMENT

1. In the early morning hours of November 29, 1981, gas station attendant Victoriano Agostini was murdered at his place of employment in the Bronx. An autopsy revealed that Agostini died from two gunshot wounds to the head. For several months the police had no leads in the case. In the spring of 1982, during an investigation of an unrelated murder of one Jerry Cruz (no relation to petitioner), the police interviewed Norberto Cruz, Jerry's brother. Norberto told the police that on the day of the Agostini murder, petitioner and his brother, co-defendant Benjamin Cruz, came to Norberto's apartment and told him that they had killed a gas station attendant in the Bronx. Pet. App. A4-A5; J.A. 32, 52-53; Tr. 28-29, 35-36, 38-39, 51.[1]

On May 3, 1982, the police interviewed Benjamin Cruz about the Jerry Cruz murder. While he was being questioned about that murder, Benjamin spontaneously admitted to the police that he and petitioner had killed a gas station attendant in the Bronx. Later that same evening, Benjamin gave a detailed, videotaped statement admitting his participation in the gas station murder. Pet. App. A5; J.A. 23, 68-69; Tr. 190-194. Based on Norberto's statements and Benjamin's admissions, indictments were returned against both Benjamin and petitioner for felony murder and related charges (J.A. 1, 3-13).

[1] "Tr." refers to the transcript of the second trial in this case (the first trial ended in a mistrial as a result of juror misconduct). The transcript of the first trial is referred to as "1st Tr." The transcript of the pretrial suppression hearing is referred to as "5/25/83 Tr."

2. At trial, Norberto testified in detail about his conversation with petitioner and Benjamin on November 29, 1981 (J.A. 31-51). At about 10:00 a.m. on that day, only hours after the police had discovered the murder victim, petitioner and Benjamin, both long-time acquaintances of Norberto's, stopped by Norberto's apartment.[2] Petitioner was very nervous and had a blood-stained bandage around his right arm. Pet. App. A4; J.A. 32-33; Tr. 28-29, 35-36, 38-39, 51. Norberto asked petitioner what had happened; petitioner explained that he and Benjamin "had gone to give a hold up to a gas station." Petitioner said he started struggling with the gas station attendant. The attendant then "bent down" and "took out a gun and fired." At that point, petitioner said, Benjamin "jumped up and fired at the man in the gas station." J.A. 33.

Benjamin then added to petitioner's description of the incident. He told Norberto that petitioner had sent him to search the gas station attendant but that he "hadn't done it well" (J.A. 34). Benjamin said that he saw the gas station attendant bend over, take out a gun, and fire at petitioner, at which point Benjamin shot the attendant (J.A. 34).[3] During his conversation with Benjamin and petitioner, Norberto offered to take petitioner to the hospital; petitioner declined, stating that he did not want to go to the hospital because it was "very dangerous" (J.A. 35). After about an hour, petitioner

[2] Norberto had known Benjamin for 15 years and petitioner for 25 years (J.A. 31-32). Norberto remembered the date of the visit because his wife had been discharged from the hospital that day (Pet. App. A5; J.A. 44).

[3] Benjamin did not say how petitioner got hurt or why he and petitioner had gone to the gas station in the first place (J.A. 34). Those facts had previously been discussed by petitioner, however, in Benjamin's presence (J.A. 33).

and Benjamin left the apartment along with Jerry Cruz, who resided with Norberto and who had been asleep during Norberto's conversation with petitioner and Benjamin (J.A. 35).[4] The next day, Benjamin returned to Norberto's apartment. Benjamin advised Norberto to clean the blood out of his car, which Norberto had lent to Jerry Cruz, because it was "very dangerous for Jerry" (J.A. 36).

Norberto did not inform the police of petitioner's and Benjamin's statements until April 1982.[5] He did so during an interview with Detective George Wood concerning Jerry's murder. J.A. 46-47; Tr. 208. On May 3, 1982, Benjamin came to the police station after Wood had left his card at Benjamin's home with a message that he wanted to discuss Jerry's murder (Tr. 209-210). Using an interpreter, Wood asked Benjamin if he knew anything about the murder of Jerry Cruz. Benjamin said that he did not, but he stated spontaneously that he had shot someone who shot his brother at a gas station in the Bronx. J.A. 29-30; Tr. 95, 191.[6] Benjamin was then advised of his *Miranda* rights (Tr. 82).

Later that evening, an Assistant District Attorney took a videotaped statement from Benjamin (J.A. 61-69; Tr.

[4] As the police later learned from Benjamin, Jerry Cruz was also a participant in the gas station holdup (Pet. App. A4; J.A. 65).

[5] When Norberto was asked at trial why he had not told the police about the statements earlier, he responded, through the court interpreter, that it was "[b]ecause [his] brother had the event" (J.A. 45). What Norberto apparently was trying to say was that he did not want to say anything because his brother, Jerry Cruz, was one of the perpetrators. Jerry was murdered in March 1982 (Tr. 207).

[6] The evidence at the suppression hearing revealed that Benjamin referred to the gas station murder to convince the police that he was telling the truth when he denied having anything to do with Jerry's murder. Benjamin told Detective Wood that "[i]f it was me, I would tell you." He then stated: "I have big balls. I killed the guy at a gas station at 149th Street and Southern Boulevard, who shot my brother clean into the arm. I shot him in the head with a 357 Magnum." 5/25/83 Tr. 7.

214-215). In his videotaped statement, Benjamin indicated that he had shot and killed a gas station attendant in November 1981 with a .357 magnum after the attendant had shot petitioner (J.A. 62). Benjamin correctly identified the location of the station and stated that after arriving there, he had pulled out a gun. Benjamin said that he and petitioner had told the attendant that "this was a holdup." J.A. 63, 67. Benjamin and petitioner then asked for money, but the attendant said it was not his to give away. Petitioner threatened the attendant, demanded money, and hit him on the bridge of the nose, whereupon petitioner and the attendant began fighting. The attendant fired a shot at petitioner and hit him in the left arm. Benjamin told petitioner to "look out" and then, from close range, shot the attendant between the eyes and killed him. J.A. 63-64, 67. Benjamin and petitioner took the attendant's money—a total of $62—and fled (J.A. 65).[7]

In addition to the statements by Benjamin and petitioner,[8] the government introduced medical and ballistics evidence. The Associate Medical Examiner testified that the victim died of two gunshot wounds. One shot hit the victim above the right ear. The other shot—which caused most of the damage—entered the victim's skull through the left side and traveled, in a downward path, to the right side. In addition, the victim had blunt force in-

[7] According to Benjamin, petitioner also fired a shot—"he shot him like to burn the clothes very close" (J.A. 68). Benjamin said that four individuals were involved in the robbery. The driver, Jerry Cruz, remained in the car (J.A. 65). Benjamin did not describe the specific role of the fourth participant, whom he called "Pacho" (J.A. 66). Benjamin also stated that after the incident, he and the other participants bandaged petitioner's arm (J.A. 67-68). Throughout his statement Benjamin referred to petitioner as "Chino" (see J.A. 65).

[8] When the statements were introduced at trial, and again during final jury instructions, the trial court instructed the jury that each defendant's statements were to be considered only against that defendant (J.A. 30-31, 33-34, 36, 59).

juries (due to a blow or a fall), including a laceration at the bridge of his nose, bruises around both eyes, and abrasions on his right cheek and left shoulder. J.A. 52-53; Tr. 229-231. A ballistics expert testified that the bullet recovered from the victim was a .38 caliber bullet, which could have been fired from a .38 caliber or a .357 magnum revolver. J.A. 54; Tr. 234-237.[9]

The jury found both Benjamin and petitioner guilty of felony murder, the only charge submitted for its consideration (Tr. 387). Petitioner was sentenced to a prison term of 15 years to life (J.A. 2).

3. On appeal, petitioner contended that the admission of Benjamin's statement violated petitioner's rights under the Confrontation Clause. He maintained that Benjamin's statement did not "interlock" with his own statement because Benjamin's statement was substantially more reliable. The Appellate Division of the New York Supreme Court affirmed the conviction without opinion (J.A. 71); petitioner was later granted leave to appeal to the New York Court of Appeals (J.A. 72).

The New York Court of Appeals affirmed petitioner's conviction by a divided vote (Pet. App. A1). The court of appeals reasoned that there was no Confrontation Clause violation because the statements by Benjamin and petitioner were interlocking. The court noted that although there were differences between the confessions, they were in agreement on "the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed" (Pet. App. A12). While acknowledging that Benjamin's confession was substantially longer than petitioner's, the court pointed out that "the details included did not contradict or modify the essential elements of [petitioner's] statement" (*ibid.*). The court rejected petitioner's contention that the confessions should not

[9] Petitioner did not put on any evidence (Tr. 292). Benjamin put on testimony by his mother that he was mentally slow for his age (Tr. 282-284).

be deemed interlocking because they differed in the degree of their reliability (Pet. App. A14).

The dissenting judges concluded that Benjamin's confession added substantial weight to the otherwise weak confession evidence introduced against petitioner, and that the two confessions were therefore not interlocking. In the dissenters' view, the jury must have considered Benjamin's confession in determining whether petitioner had in fact confessed to Norberto. Therefore, they concluded, the admission of Benjamin's statements in the joint trial violated the principles of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. A19-A21.

SUMMARY OF ARGUMENT

A. This Court has made it clear that out-of-court statements can be admitted against a defendant without violating the Confrontation Clause, even if the defendant has no opportunity to cross-examine the declarant, as long as the statements contain adequate "indicia of reliability." See *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 12-13; *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Although an accomplice's custodial confession is considered "presumptively unreliable," the presumption may be rebutted in a particular case if the circumstances show that the confession is highly likely to be reliable. *Lee*, slip op. 11-13.

Benjamin's out-of-court statements in this case contained numerous indicia of reliability. Specifically, the statements were against Benjamin's penal interest; they were corroborated by the physical evidence at trial and by petitioner's own interlocking confession; there is nothing to suggest that Benjamin's statements were based on faulty memory or that Benjamin had any reason to make a false accusation against petitioner: petitioner was able to confront Norberto and the police on whether Benjamin in fact made the statements and under what circumstances; and the jury was able to observe Benjamin's demeanor during the course of his videotaped confession.

Moreover, even if the Confrontation Clause requires that an accomplice be shown to be unavailable before his confession can be admitted against a defendant, Benjamin was unavailable to the government at the trial in this case, since he was a co-defendant who could not be called as a witness. Under these circumstances, the Confrontation Clause would not have prohibited the State from using Benjamin's statements as substantive evidence against petitioner. It follows, *a fortiori*, that the admission of those statements solely against Benjamin could not have violated petitioner's confrontation rights.

B. The admission of Benjamin's statements was valid for yet another reason: because petitioner gave a confession that "interlocked" with Benjamin's confessions, Benjamin's statements did not have a "devastating" effect on petitioner's case, and severance was therefore not required. This principle—that the holding in *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), does not apply to cases involving interlocking confessions—was adopted by the plurality in *Parker* v. *Randolph*, 442 U.S. 62 (1979). The rationale of the *Parker* plurality is eminently sound: a co-defendant's confession can hardly have devastating consequences for the defendant when the defendant himself has confessed. In that situation, there is no reason not to follow the general rule that juries can understand and apply instructions, including limiting instructions directing the jurors not to consider the co-defendant's statements against the defendant.

In the present case, the confessions interlocked on all the essential elements of felony murder. Both petitioner and his co-defendant admitted that they went to rob a gas station, that the attendant reached for a gun and shot petitioner in the arm, and that the co-defendant then shot and killed the attendant. Although petitioner claims that Norberto Cruz, the witness who testified about petitioner's confession, fabricated the whole conversation, Norberto's testimony was fully corroborated by the physical evidence and by various details in the co-defendant's later confession. Under those circumstances, petitioner's

claim that the confessions were not truly interlocking is without merit.

ARGUMENT

THE ADMISSION OF THE CO-DEFENDANT'S CONFESSION AT THE JOINT TRIAL DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE

A. Because The Co-Defendant's Statements Contained Strong Indicia Of Reliability, Petitioners' Confrontation Rights Were Not Violated

1. The usual method for ensuring the reliability of a statement is through cross-examination. *California* v. *Green*, 399 U.S. 149, 158 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 406-407 (1965); *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). This Court has made it clear, however, that cross-examination of the declarant is not a prerequisite to the admission of every out-of-court statement offered against a defendant at trial. Instead, a variety of out-of-court statements are considered to carry sufficient "indicia of reliability" to be admissible, even in the absence of cross-examination. See *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 12-13; *Ohio* v. *Roberts*, 448 U.S. 56, 64-65 (1980); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972); *Dutton* v. *Evans*, 400 U.S. 74 (1970). When a particular statement falls within "a firmly rooted hearsay exception," the reliability of the statement can be inferred, without more. *Ohio* v. *Roberts*, 448 U.S. at 66. Even when a statement does not fall within a traditional hearsay exception, the Court has held that it "may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" *Lee* v. *Illinois*, slip op. 13, quoting *Ohio* v. *Roberts*, 448 U.S. at 66; *Dutton* v. *Evans*, 400 U.S. at 88-89.

Analysis of the "indicia of reliability" accompanying Benjamin Cruz's confessions leads to the conclusion that

Benjamin's statements were sufficiently trustworthy to be admitted at trial without offending the Confrontation Clause. For that reason, there would have been no constitutional objection if Benjamin's statements had been admitted as substantive evidence against petitioner. It follows, *a fortiori*, that the admission of the statements solely against Benjamin, with limiting instructions directing the jury not to consider them against petitioner, could not have violated petitioner's confrontation rights. See *Nelson* v. *O'Neil*, 402 U.S. 622, 628-630 (1971).

In *Dutton* v. *Evans*, *supra*, this Court upheld, over a Confrontation Clause objection, the admission of an out-of-court statement that did not fall within a well-settled hearsay exception. *Dutton* involved the admission, at Evans's murder trial, of a statement made by one of Evans's accomplices to a cellmate named Shaw. The accomplice, Williams, had told Shaw that " '[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now' " (400 U.S. at 77). Williams's statement was introduced at trial against Evans through the testimony of Shaw. In an opinion by Justice Stewart, four members of the Court concluded that the admission of Shaw's testimony against Evans did not violate Evans's confrontation rights.[10]

The plurality concluded that Williams's statement was sufficiently reliable to be admitted against Evans, even though Williams had not been subject to cross-examination. Among the reasons that the Court listed in support of its finding of reliability were the following: (1) Williams's personal knowledge of the role played by others in the murder was sufficiently well established that it was "inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not

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[10] Justice Harlan concurred in the result. Viewing the case as involving due process, not the Confrontation Clause, he concluded that there was no due process violation. See 400 U.S. at 93-100.

Evans was involved in the murder" (400 U.S. at 88); (2) it was highly unlikely that Williams's statement was based on faulty recollection; and (3) the circumstances under which Williams made his statement, which was spontaneous and against his penal interest, made it unlikely that he had fabricated the statement to inculpate Evans. 400 U.S. 88-89.

Recently, in *Lee* v. *Illinois*, *supra*, the Court employed a similar approach to determine the reliability of another out-of-court statement by an accomplice. The issue in *Lee* was whether the trial court, at a bench trial, had properly considered the co-defendant's confession as substantive evidence against Lee. Since the case turned on its precise facts, those facts bear close examination.

During questioning about the stabbing deaths of her aunt and her aunt's friend, Lee confessed to the police that she and her boyfriend, co-defendant Edwin Thomas, had committed the stabbings. Thomas subsequently arrived at the police station for questioning. At first, he did not want to answer questions but instead wanted to think about whether he should talk to the police. Thomas and Lee asked to see each other, and they were given permission to do so. One of the police officers then asked Lee, in Thomas's presence, " 'what was the statement you had just given us implicating [Thomas].' " Lee then told Thomas that the police already knew everything and reminded him that they had agreed not to let one of them take the whole "rap." At that point, Thomas confessed as well. *Lee*, slip op. 2.

The majority pointed out that Lee's and Thomas's confessions differed in a number of important respects. For example, Thomas told the police that he and Lee had previously discussed killing Lee's aunt, thus admitting premeditation. Lee, by contrast, made no mention of any plan and indicated that at the time of the murder Thomas had simply been provoked by the behavior of the aunt. In addition, Lee placed the blame on Thomas for the murder of her aunt's friend; by contrast, Thomas

stated that, pursuant to their plan, Lee had beckoned the friend into the kitchen so that Thomas could murder her. *Lee*, slip op. 4-6, 15-16.

In ruling that the trial court had improperly considered Thomas's confession as substantive evidence against Lee, the Court stated that "Thomas' statement, as the confession of an accomplice, was presumptively unreliable and * * * did not bear sufficient independent 'indicia of reliability' to overcome that presumption" (*Lee*, slip op. 9). The Court made clear (*id.* at 12-13) that "the presumption [of unreliability] may be rebutted" but stated that the prosecution had simply failed to do so in that case. Although the Court acknowledged that the existence of an interlocking confession by the defendant provides significant support for the reliability of the co-defendant's statement, the Court found that Thomas's statement differed on too many key points to be considered "interlocking" with Lee's (*id.* at 14-16).

Four justices dissented in *Lee*. The dissenters would have found Thomas's statement to be sufficiently reliable to eliminate any Confrontation Clause problem. Thus, while the Court in *Lee* was split on the issue of whether Thomas's out-of-court statement was shown to be sufficiently reliable on the facts of that case, there was no disagreement that, in a proper case, a non-testifying co-defendant's out-of-court statement may be admitted as substantive evidence against the defendant.[11]

In the present case, there was no Confrontation Clause violation. Benjamin's statements present none of the

[11] Following the decision in *Lee*, this Court vacated and remanded for further proceedings a decison by the Supreme Court of New Mexico holding that the admission of a non-testifying co-defendant's statement violated the defendant's rights under the Confrontation Clause. *New Mexico* v. *Earnest*, No. 85-162 (June 27, 1986). In a concurring opinion, Justice Rehnquist wrote for four members of the Court (slip op. 2) that "the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."

problems that troubled the majority in *Lee*. Instead, they bear numerous distinct indicia of reliability. When these factors are viewed collectively, they lead to only one conclusion—that Benjamin's statements were sufficiently reliable to justify admission against petitioner even in the absence of cross-examination.

To begin with, Benjamin's statements fall "within a firmly rooted hearsay exception"—declarations against penal interest. The reliability of the statements can therefore "be inferred without more" (*Ohio v. Roberts*, 448 U.S. at 66).[12] Benjamin's statements were clearly against his penal interest, since he admitted committing a murder during the course of a robbery (J.A. 30, 34, 61-69) and thereby subjected himself to criminal prosecution for felony murder and related offenses. He did not attempt to "shift the blame" to petitioner but took primary responsibility for the incident.[13] Moreover, there

[12] A hearsay exception for declarations against penal interest is recognized in most jurisdictions, including the federal system (see Fed. R. Evid. 804(b)(3)) and New York (see, *e.g.*, *People* v. *Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985)). That exception "rests upon 'the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect'" (*Lee*, slip op. 5 (Blackmun, J., dissenting), quoting 5 J. Wigmore, *Evidence* § 1457, at 329 (J. Chadbourn rev. 1974) (footnote omitted)). See also *United States* v. *Harris*, 403 U.S. 573, 583 (1971) ("Admissions of crime * * * carry their own indicia of credibility."); *Donnelly* v. *United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("[N]o other statement is so much against interest as a confession of murder."). The exception for declarations against penal interest covers not only statements implicating the maker but also statements implicating, and sought to be admitted against, the defendants. See, *e.g.*, *United States* v. *Riley*, 657 F.2d 1377, 1382 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Palumbo*, 639 F.2d 123, 129-130 (3d Cir.) (Adams, J., concurring), cert. denied, 454 U.S. 819 (1981); *United States* v. *Sarmiento-Perez*, 633 F.2d 1092, 1098 (5th Cir. 1981), cert. denied, 459 U.S. 834 (1982).

[13] Petitioner is simply wrong in asserting (Pet. Br. 20) that "Benjamin heaped substantial blame on petitioner" and "mini-

is nothing to suggest that Benjamin's statements were made as part of an effort to curry favor with the police.[14] Indeed, on the very date of the murder—long before any conversation with the police—Benjamin fully admitted his culpability to Norberto, in the presence of petitioner. In addition, Benjamin spontaneously admitted his role in the gas station murder while he was being questioned by the police about an unrelated matter and at a time when he clearly was not in custody and had not been accused of any crime (Tr. 110). See *Dutton*, 400 U.S. at 89 (noting that statement was spontaneous and against penal interest). He did so, almost in a bragging manner, to show the police that he was telling the truth in claiming that he had nothing to do with Jerry's murder. See page 4 note 6, *supra*. There is no evidence whatsoever to suggest that Benjamin admitted the murder as a result of prompting by the police or in the hope that he would win lenient treatment by making the admission. The subsequent videotaped statement, which was ruled to be voluntary (see Tr. 111-113),[15] was

miz[ed] his own culpability." Benjamin at all times took responsibility for actually killing the attendant.

[14] When a defendant is attempting to curry favor with the police, his statements may be unreliable, particularly when the defendant attempts to shift the blame to someone else. A number of courts have therefore been reluctant to find that custodial statements to the police that implicate third parties are declarations against penal interest. See, *e.g.*, *Fuson* v. *Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *Olson* v. *Green*, 668 F.2d 421, 426-428 (8th Cir.), cert. denied, 456 U.S. 1009 (1982); *United States* v. *Riley*, 657 F.2d at 1384-1385; *United States* v. *Palumbo*, 639 F.2d at 127-128. On the other hand, when there is nothing to suggest that defendant was motivated by a desire to ingratiate himself with the police or to shift the blame, the courts have upheld the admissibility of confessions as being against the declarant's penal interest. See, *e.g.*, *United States* v. *Robinson*, 635 F.2d 363, 364-365 (5th Cir.), cert. denied, 452 U.S. 916 (1981); *United States* v. *Garris*, 616 F.2d 626, 630-632 (2d Cir.), cert. denied, 447 U.S. 926 (1980).

[15] See *Lee*, slip op. 10 (Blackmun, J., dissenting) (noting that a finding of voluntariness supports the conclusion that the statement is reliable).

simply an elaboration of what Benjamin had previously told Norberto and the police. It in no way conflicted with his earlier statements. There is similarly nothing to show that Benjamin gave the videotaped statement to curry favor with the police or as a result of police coercion.

These facts distinguish Benjamin's statements in this case from Thomas's statement in *Lee*. Thomas's statement to the police was not accompanied by a prior statement to a civilian to corroborate its reliability, and Thomas's statement, unlike Benjamin's, was not freely volunteered. Thomas initially refused to talk to the police, and he did so only after being told that Lee had already implicated him. Moreover, the Court in *Lee* found that Thomas's statement might well have been influenced by a desire to shift blame to Lee. There is no basis for attributing any such motive to Benjamin in this case.[16] Because of the circumstances in which Thomas's statement was made, the Court in *Lee* did not accept the State's characterization of Thomas's confession as a "declaration against penal interest" (*Lee*, slip op. 13 n.5).[17] Benjamin's statement, however, suffered from none of the infirmities the Court found in Thomas's confession. Under the approach of both the majority and the dissenting opinions in *Lee*, Benjamin's videotaped statement and his prior unrecorded statements to Norberto and the police fell within the traditional category of declarations against penal interest.

Further support for the reliability of Benjamin's statements derives from the fact that they were fully corrob-

[16] The absence of any apparent motivation or effort on Benjamin's part to shift blame to petitioner distinguishes this case from *Douglas* v. *Alabama*, 380 U.S. 415 (1965). See *Lee*, slip op. 10-11; *id.* at 6-7 (Blackmun, J., dissenting).

[17] The four dissenting justices in *Lee* considered Thomas's statement to be a declaration against penal interest within the meaning of the firmly established hearsay exception for such statements (*Lee*, slip op. 4-5 (Blackmun, J., dissenting)).

orated by the physical evidence. For example, Benjamin stated that he shot the attendant with a .357 magnum (J.A. 62, 64); recovered from the victim was a .38 caliber bullet, which, according to the ballistics expert, could have been fired from a .357 magnum (J.A. 52-53; Tr. 234-235). Benjamin told Norberto that he "jumped up" and shot the attendant after the attendant "ben[t] over," picked up a gun, and fired it (J.A. 34); the medical evidence revealed that the bullets entered the victim's head in a downward trajectory (Pet. App. A6; J.A. 53). Benjamin described a physical altercation between petitioner and the attendant, which resulted in petitioner's striking the attendant on the nose (J.A. 63); the autopsy revealed blunt force injuries, including a laceration in the skin at the bridge of the attendant's nose (J.A. 52). Moreover, as the court of appeals noted, the government introduced photographs showing "substantial damage to the [gas station] office, inferentially establishing [petitioner's] struggle with the attendant before the murder" (Pet. App. A5-A6). As in *Dutton* (400 U.S. at 88-89), the corroboration of Benjamin's statement not only makes it highly likely that the statement was true, but also makes it virtually inconceivable that cross-examination could have shown that Benjamin was not in a position to know whether petitioner was involved in the murder. Petitioner himself acknowledged (Pet. 10 n.4) that "Benjamin's videotaped confession contained detail so realistic and minute that only someone who was present at the homicide scene could have uttered it."

Another indication of reliability is that Benjamin's confession was corroborated on all the essential elements by petitioner's own confession, and the confessions contained no significant discrepancies. Cf. *Lee*, slip op. 14, 16 (recognizing that an interlocking confession is a sign of reliability, but finding that discrepancies between the two confessions in that case went "to the very issues in dispute at trial" and that the confessions in that case were therefore not interlocking).

Furthermore, as in *Dutton*, it is highly unlikely that Benjamin's statement was based on an inaccurate memory or on a deliberate misstatement of the events (see 400 U.S. at 89). The vivid detail of the videotaped confession refutes any suggestion of a memory lapse, and there was nothing to show that Benjamin had any motive for falsely accusing his brother of being involved in the murder. Significantly, no evidence of any hostility between petitioner and Benjamin was introduced at trial.[18]

Finally, petitioner "was not deprived of any right of confrontation on the issue of whether [Benjamin] actually made the statement[s]" (*Dutton*, 400 U.S. at 88). Norberto and various officers who heard Benjamin's statements at the police station were witnesses at trial and subject to cross-examination. In addition, the jury viewed the 22-minute videotape of Benjamin's confession and thus had the opportunity to observe Benjamin's demeanor as he described both his and petitioner's roles in the gas station murder. Cf. *California* v. *Green*, 399 U.S. at 158 (noting that cross-examination enables jury "to observe the demeanor of the witness in making his statement, thus aiding [it] in assessing his credibility").

2. In addition to being reliable, Benjamin's statements were made by a declarant who was unavailable as a witness at trial. With regard to one class of hearsay—prior testimony—this Court has held that the Confrontation Clause requires the government to prove that the declarant is unavailable to testify at the trial before the hearsay

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[18] Even if Benjamin had testified at trial, the circumstances strongly suggest that his testimony would not have helped petitioner; it is more likely that he would have tried to shift more blame to petitioner and away from himself. Benjamin did just that at his pretrial suppression hearing, where he testified that he was not involved in the murder or robbery, but that he learned about it when petitioner and others arrived home and described what had happened (5/25/83 Tr. 81-83, 105). Benjamin further testified that his earlier statement, in which he had implicated himself, was false. He said he had made that statement to protect his family and because petitioner had threatened him (*id.* at 84, 97-98).

can be admitted. See *Ohio* v. *Roberts*, 448 U.S. at 65-66. The "unavailability" requirement has not been imposed with regard to other out-of-court statements, such as co-conspirator declarations. See *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986). In particular, the Court has not ruled on the question whether an accomplice must be shown to be unavailable before his out-of-court confession can be admitted as a declaration against penal interest, although the hearsay rules typically require such a showing (see Fed. R. Evid. 804(b)(3)).[19] Even if unavailability must be shown, we submit that unavailability was established in this case.

Because Benjamin was a co-defendant at trial, the State could not call him as a witness. Under the usual standards employed to assess unavailability, Benjamin was therefore unavailable to the government at trial. See *United States* v. *Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); *United States* v. *Zurosky*, 614 F.2d 779, 792-793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Phillips* v. *Wyrick*, 558 F.2d 489, 494 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978); Fed. R. Evid. 804(a)(1). As Justice Blackmun pointed out in his dissenting opinion in *Lee*, slip op. 3-4, the State should not be required to immunize one co-defendant in order to make him available for cross-examination by another. The costs to the State and the judicial system of requiring such a procedure would outweigh any possible benefit to the defense of making the declarant available. See *United States* v. *Inadi*, slip op. 8-12.

In sum, under the analysis employed both in *Dutton* and *Lee*, Benjamin's confessions constituted highly reliable statements by an unavailable declarant. Therefore, the Confrontation Clause would not have forbidden the

[19] The dissenters in *Lee* assumed that unavailability would have to be shown before an accomplice's statement could be admitted against a defendant. *Lee*, slip op. 2 n.2 (Blackmun, J., dissenting). The majority found it unnecessary to address the point. *Lee*, slip op. 9.

admission of Benjamin's statements, even if they had been offered as substantive evidence against petitioner. For that reason, petitioner certainly cannot complain about the introduction of the statements at the joint trial, where they were admitted solely against Benjamin.

B. The Co-Defendant's Statements Were Properly Admitted At The Joint Trial Because They Interlocked With Petitioner's Own Statement

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that a co-defendant's confession that implicated the defendant could not be admitted at a joint trial, even solely against the co-defendant.[20] The Court based its decision on its conclusion that the co-defendant's confession had a "devastating" impact on the defendant's case and that the jury therefore could not be expected to follow the court's limiting instructions. In *Parker* v. *Randolph*, *supra*, the issue was whether *Bruton* applied even where the defendant himself had also confessed. In an opinion for four members of the Court, Justice Rehnquist concluded that the principle announced in *Bruton* does not apply in the case of "interlocking" confessions. The plurality concluded that where a defendant himself has confessed, "the incriminating statements of a co-defendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton*" (442 U.S. at 73). For the same reason, "[s]uccessfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged" (*ibid.*). The plurality concluded that "when the defendant's own confession is properly before the jury, * * * [t]he possible prejudice resulting from the failure of the jury to follow

[20] The Court acknowledged that (391 U.S. at 128 n.3) "[t]here is not before us * * * any recognized exception to the hearsay rule * * * and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."

the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions" (*id.* at 74-75 (footnote omitted)).

Justice Blackmun concurred in the judgment. He refused to endorse the plurality's per se approach. He concluded, however, that the *Bruton* violation in that case was harmless beyond a reasonable doubt, and that it would likely be harmless in most other interlocking confession cases as well (442 U.S. at 77-81).

1. Petitioner argues (Pet. Br. 21-26) that the Court should reject the approach taken by the plurality in *Parker* v. *Randolph*, *supra*, and hold that the admission of a co-defendant's confession violates the principles of *Bruton*, even when the co-defendant's confession interlocks with the defendant's own confession. He maintains that even when the defendant has confessed, cross-examination would not necessarily be futile. The right of confrontation must be enforced, he asserts, even if "exercising [that] right would have 'yield[ed] small advantage.'" Pet. Br. 22.

We submit that the analysis in the plurality opinion in *Parker* was correct. When a defendant himself has confessed, the co-defendant's confession will almost never be "devastating" to the defendant's case. It does not disparage Confrontation Clause values to hold that a jury is likely to be able to follow a court's limiting instructions where the impact of a co-defendant's confession is blunted by the defendant's own admissions of guilt. In addition, the plurality's approach in *Parker* permits joint trials in cases in which the risk of prejudice to the defense is low. As the Court has noted, joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial" (*Bruton*, 391 U.S. at 134). Although the government can avoid severances simply by not using confessions in multidefendant cases, that approach exacts a very high price, since a

confession is "probably the most probative and damaging evidence that can be admitted against [a defendant]" (*Bruton*, 391 U.S. at 139 (White, J., dissenting)).[21]

The "harmless error" approach urged by petitioner is not a satisfactory alternative. The harmless error approach instructs trial courts that they are constitutionally required, even in interlocking confession cases, either to sever the cases or to exclude all statements by non-testifying co-defendants. As Justice Blackmun has observed, the failure to grant such relief in interlocking confession cases will usually be harmless (*Parker*, 442 U.S. at 79 (opinion of Blackmun, J.)). Yet in every interlocking confession case, including those in which any error would be virtually certain to be regarded as harmless on appeal, the "harmless error" approach would compel the trial judge to grant a severance or to prohibit the use of both defendants' confessions at trial. The better approach, we submit, is to permit joint trials in interlocking confession cases, subject to the discretion of trial courts to grant relief in particular instances if a serious risk of prejudice appears.

2. Petitioner further argues (Pet. 10-14; Pet. Br. 30-32) that even if a majority of this Court adopts the plurality approach in *Parker*, it should nonetheless reverse petitioner's conviction because the confessions in this case were not "interlocking." While he apparently concedes that the confessions were "factually interlocking" (Pet. 12),[22] petitioner asserts that they were not

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[21] Another solution is to redact the confessions to omit any references in each defendant's confession to the other defendant. However, it is not always possible to redact statements in that manner without gravely distorting their meaning. The Court now has before it the question whether redaction that simply omits all specific references to the other defendant is constitutionally sufficient. See *Richardson* v. *Marsh*, cert. granted, No. 85-1433 (June 9, 1986).

[22] Petitioner does contend (Pet. 11; Pet. Br. 27 n.12) that Benjamin's statements filled in "gaps" in the case against petitioner

sufficiently interlocking to satisfy the *Parker* test because of their "gross disparity in reliability" (Pet. 14). According to petitioner (Pet. 10 & n.4, 14), Benjamin's statements were highly reliable, whereas the reliability of Norberto's testimony about petitioner's confession was suspect. That argument is not persuasive.

In our view, the issue of whether statements are "interlocking" should be determined by the trial court, based on all the circumstances and subject to review only for abuse of discretion. Statements should be deemed interlocking if they are " 'substantially the same and consistent on the major elements of the crime involved.' " *Tamilio* v. *Fogg*, 713 F.2d 18, 20 (2d Cir. 1983), cert. denied, 464 U.S. 1041 (1984) (quoting *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45, 49 (2d Cir.), cert. denied, 423 U.S. 872 (1975)). The central focus of the inquiry should be whether the differences between the confessions are so fundamental that, despite the defendant's own confession, the admission of the co-defendant's confession will nonetheless have a "devastating" effect on the defendant (*Bruton*, 391 U.S. at 136).[23] Where the confessions interlock on the key facts, each defendant's confession will almost never have a devastating impact on the other defendant. While differences in the reliability of the statements may be relevant to the trial court's inquiry, those differences ordinarily should matter only when they are so fundamental that there is a serious doubt as to whether the defendant confessed at all. Absent such a grave divergence in reliability, the presence of a confession by each defendant will help ensure that the jury will be able to follow the court's instruction to consider the evidence against each defendant separately. For that reason, purported differences in reliability ordinarily should not prevent the application of the interlocking confession rule articulated by the *Parker* plurality.[24]

Under this approach, petitioner's confrontation rights were not violated by the admission of Benjamin's statements. Both the trial court and the court of appeals correctly ruled that the confessions were factually interlocking (Pet. App. A12; J.A. 23, 27-28). Each confession established all the elements of felony murder, and Benjamin and petitioner were in full agreement about their respective roles in the crime.

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because only Benjamin's statements revealed (1) that petitioner and Benjamin went to Norberto's house to pick up Jerry Cruz, (2) that Jerry was involved in the robbery, and (3) that it was because of Jerry's involvement in the robbery that Norberto failed to inform the police earlier about the confessions. These claims are erroneous. Norberto clearly testified that Jerry left with petitioner and Benjamin at the end of the visit on November 29, 1981 (J.A. 41). Moreover, in response to the question why he did not tell the police about the statements earlier, Norberto replied, through an interpreter, that it was because Jerry "had the event" (J.A. 45). That response suggests that Norberto did not go to the police because Jerry was a participant in the offense. That explanation is consistent with Norberto's informing the police about the statements only after Jerry's death.

[23] The approach we suggest addresses Justice Blackmun's concern in *Parker* (442 U.S. at 80) that if the plurality "is willing to abandon the factual inquiry that accompanies a harmless-error determination, it should be ready, at least, to substitute an inquiry into whether there is genuine interlocking * * *."

[24] In his dissenting opinion in *Parker*, Justice Stevens posed a hypothetical situation (442 U.S. at 84-85) in which a co-defendant confesses on television about how he and the defendant planned and carried out a murder, while the defendant's statement is "the testimony of a drinking partner, a former cellmate, or a divorced spouse of [defendant] who vaguely recalls [defendant] saying that he had been with [co-defendant] at the approximate time of the killing." Justice Stevens uses the disparity in the quality and contents of the statements in the hypothetical to demonstrate what he believes to be the problem with the plurality's approach in *Parker*. That hypothetical, however, is inapposite here. The defendant's statement in the hypothetical did not constitute a confession; it was merely a statement that the defendant had been with the co-defendant at the approximate time of the offense. The two statements therefore would not be interlocking at all. In this case, by contrast, the two defendants' statements interlocked on all the essential facts of the offense. In addition, unlike in the hypothetical, Norberto had a clear memory of petitioner's statements, not simply a vague recollection of petitioner's remarks.

Petitioner claims that Norberto's testimony was unreliable for the following reasons: (1) Norberto had a "prior record"; (2) he received welfare payments while working "on the street" as a mechanic; (3) he accepted money from his brother without inquiring about its source; (4) at the prior trial Norberto testified that Benjamin, not petitioner, had confessed to him; (5) Norberto waited several months before reporting the incriminating statements to the police; and (6) Norberto was seeking revenge because he thought petitioner had murdered his brother (Pet. 11; Pet. Br. 27-28).

These points do not withstand analysis. Norberto's criminal record consisted solely of an eight-year-old traffic conviction for driving without a license (J.A. 36-37); thus, except for one minor traffic offense, Norberto had a clean record. His receipt of welfare payments while he was performing occasional work on the street as a mechanic does not in any way suggest dishonesty or unreliability on Norberto's part (see 1st Tr. 194). Similarly, the money Norberto received from Jerry was simply Jerry's contribution to the upkeep of the household (J.A. 40-41). It is probative of nothing that Norberto did not interrogate Jerry as to where he got the money to pay his share of the expenses. Petitioner's claim that Norberto, at the first trial, maintained that Benjamin alone had confessed is incorrect; Norberto clearly testified that both petitioner *and* Benjamin had told him about the murder.[25] As to Norberto's reasons for not going to

[25] Petitioner bases his contention on the fact that at one point Norberto testified that when he asked petitioner what happened, Benjamin spoke (Pet. 11; see J.A. 50). Petitioner overlooks Norberto's testimony that petitioner, as well as Benjamin, had told him about the robbery (1st Tr. 151-152):

> Q: [By the prosecutor]: Did you ask [petitioner] how he got hurt?
>
> A: [By Norberto]: Yes. I asked him what had happened.
>
> Q: And what did he say how he got hurt?

the police sooner, Norberto's testimony (J.A. 45) suggests that, given Jerry's involvement in the incident, he did not want to report the statements and risk getting his brother in trouble. In any event, it is hardly surprising that a person would fail to come forward with evidence of a crime, but then report that evidence when approached by the police, as was the case with Norberto. Finally, petitioner was unsuccessful at trial in his effort to show that Norberto was attempting to implicate petitioner in a crime he did not commit in order to avenge Jerry's death. As the court of appeals noted (Pet. App. A13 n.2), there is nothing in the record to support that claim.

To the contrary, a number of factors underscore the reliability of Norberto's testimony. To begin with, his testimony (J.A. 33) that petitioner said the attendant "bent down" and that Benjamin then "jumped up and fired" is confirmed by the medical evidence that the bullets entered the victim traveling in a downward path (J.A. 53).[26] Norberto's recollection of petitioner's de-

> A: To [sic] the guy in the gas station had taken out a gun and had shot him.
>
> Q: And what happened—Did he tell you what happened to the guy who shot him?
>
> A: Yes. That they were wrestling, and when he bent over, he took out the revolver and fired and then, jumped, Benjamin jumped and fired.
>
> Q: Who fired? I'm sorry. Who fired at who?
>
> A: Benjamin.
>
> Q: Fired at who?
>
> A: The guy in the gas post.
>
> Q: And when [petitioner] told you that, where was Benjamin?
>
> A: He was present.

[26] Photographs of the murder scene that were admitted at trial (reproduced in the State's Brief in the New York Court of Appeals at 15-16) show that the gas station had a counter. Since the area behind the counter was covered with blood (as the photographs

scription of the events—that Benjamin was the one who killed the attendant, that petitioner was wounded by the attendant, and that the murder occurred during a hold-up—was fully consistent with Benjamin's statement to the police.[27] And Norberto gave unimpeached testimony about an easily verifiable fact—that he remembered the date of his conversation with petitioner and Benjamin because his wife had been released from the hospital that day (Pet. App. A5; J.A. 44). In addition, as the first trial court noted (J.A. 23), "Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police." In the end, Norberto's testimony was corroborated by the physical evidence and by Benjamin's statements, and Norberto was not impeached in any significant way.[28]

Petitioner has therefore failed to show why the principle articulated by the plurality in *Parker* should not apply in this case. The confessions interlocked on all of the key facts, as the courts below found (Pet. App. A11-A12; J.A. 23). And petitioner's assertion that Norberto's testimony was unreliable is factually unfounded. Ad-

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show), it is likely that the victim was shot while he was behind the counter. Because Benjamin was probably in front of the counter when he shot the attendant, it is understandable why Benjamin had to jump up when the attendant bent down.

[27] Petitioner finds it significant (Pet. Br. 5, 28-29 & n.14) that Norberto said that petitioner's right arm was injured while Benjamin said it was the left one. The important point, however, is that both Norberto and Benjamin testified that petitioner was wounded by the gas station attendant and had a bandage on one of his arms.

[28] Norberto withstood vigorous cross-examination by two defense attorneys at two trials in this case—the first trial having ended in a mistrial because of juror misconduct. Defense counsel also had potential impeachment material in the form of Norberto's grand jury testimony. A reading of Norberto's testimony at both trials reveals that defense counsel scored few points—and certainly no major ones—in their lengthy cross-examinations.

mission of Benjamin's statements at the joint trial, in the face of petitioner's own complete confession to felony murder, therefore did not have the "devastating" consequences to his case that are required for the principles of *Bruton* to apply.

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted.

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